IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1083

M. C. MANUFACTURING CO., INC., AND
UNIVERSAL AUTOMATIC MACHINE CO., INC.
Petitioners,

v.

TEXAS FOUNDRIES, INC., AND H/R PRODUCTS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, Texas Foundries, Inc. and H/R Products, Inc. (hereinafter referred to as "Texas Foundries" and "H/R", respectively), respectfully submit this their Brief in Opposition to Petitioners' Petition for Writ of Certiorari and respectfully pray that the Court deny issuance of the writ.

OPINIONS BELOW

Respondents admit that Petitioners' references to the opinions of the courts below are correctly stated.

JURISDICTION

Respondents admit that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(1), but Respondents deny that there are any "special and important reasons," as required by Rule 19(1) of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

QUESTIONS PRESENTED

Respondents admit that Petitioners present one question arising under the Sherman Act and one question arising under the Robinson-Patman Act. Respondents entirely disagree with Petitioners' characterizations of the nature of those questions, however, and here restate the issues raised. In addition, if the Court should issue its writ in this case, Respondents will assert by cross-point fourteen other questions that were presented to, but which were not decided by, the Court of Appeals.

The Sherman Act Question

Respondents agree that the Court of Appeals held that Petitioners failed to prove the *fact* of injury (as distinguished from the *amount* of injury) resulting from an alleged violation of Section 1 of the Sherman Act. Petitioners misconceive the basis for that holding when they suggest that the court below concluded that the allegedly discriminatory price from Texas Foundries to H/R could not be considered at all in testing the fact of damage. In fact, the Court of Appeals squarely ruled that when a Sherman Act violation is alleged to have resulted from the granting of a special, discriminatorily low price to one of plaintiff's competitors, the fact of injury is not tested by hypothesizing what plaintiff's situation would have been if it too had received an illegal and discriminatory price but should instead be tested by determining what plaintiff's position would have been had the discriminatory price not been granted to one of its competitors. Thus, the first question is as follows:

1. Did the Court of Appeals correctly conclude that Petitioners failed to establish the fact of injury where,
   (a) the evidence shows that Universal would have been in no better a position had Texas Foundries not extended the "discriminatory price" to H/R, and

   (b) the record evidence conclusively establishes that the second-low bidder's bid "stood between Universal and the opportunity to acquire this contract"?[1]

The Robinson-Patman Act Question

Petitioners statement of this issue does not reflect the actual basis of the decision of the Court of Appeals. As one major basis for its decision, the Court of Appeals held that the Government's selection of single producers under each of the contracts in question "precluded the possibility of competition between these suppliers as a matter of law."[2] Thus, the Court of Appeals found as a matter of fact and of law that the parties were not in competition (for Robinson-Patman Act purposes), and the second question presented is therefore as follows:

2. Did the Court of Appeals correctly conclude that Petitioners failed to establish a Robinson-Patman Act violation where the two "purchasers" in question were not competing, and could not compete, in *supplying* the same government contract (as opposed to bidding for the same contract)?

Respondents' Questions Pretermitted by the Court of Appeals

If a writ of certiorari should issue in this case, Respondents will present to the Court each of the following points, which were presented to the Court of Appeals and which were expressly pretermitted by that court. Each of these points provides an alternative ground justifying the result reached by the Court of Appeals and they are here merely listed without discussion:

1. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand

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[1] Opinion below, 517 F.2d 1059, 1064; Petitioners' Appendix at 5.
[2] *Id.*, 517 F.2d at 1066-67; Petitioners' Appendix at 7.

because the record contains no evidence sufficient to support a finding that Respondents entered the alleged agreement in November 1971?

—. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand because the record does not support findings of the existence of all elements necessary to the anti-trust violation alleged:

2. *Two purchases:* Does a price quotation to one company followed by a sale to another company satisfy the "two purchases rule"?

3. *Contemporaneous sales:* Does making deliveries under a contract made with one company on November 12, 1971 at the time of entering another contract with a different company on January 17, 1972, satisfy the "contemporaneous sales" requirement?

4. *Like grade and quality:* Are raw castings of Type "G" lifting plugs with the gate stubs left on of "like grade and quality" as castings with gate stubs ground off?

5. *Substantial effect on competition:* Does this record contain evidence sufficient to support a finding that the effect of Respondents' dealings would substantially "lessen competition"? [*indirectly decided by the Court of Appeals*]

6. *Knowing inducement or receipt*: Does this record contain evidence sufficient to support a finding that H/R knowingly "induced or received a discrimination in price"?

7. In regard to Respondents' point 3, did the trial court err in allowing witness Childress to testify that Universal "purchased" from Texas Foundries on the date of delivery rather than on the date of contracting?

—. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand because the record conclusively establishes the existence of statutory defenses:

8. *Meeting competition*: Does the record conclusively establish that Texas Foundries' price to H/R was "made in good faith to meet an equally low price of a competitor"?

9. *Changed market conditions:* Does the record conclusively establish that Texas Foundries price to H/R was "in response to changing conditions affecting the market for or the marketability of the goods concerned"?

10. Did the trial court err in submitting the damages issue to the jury and in allowing the jury's verdict to stand because the record contains no evidence to support a finding on damages that is not wholly speculative and conjectural?

11. In regard to Respondents' point 10, did the trial court err in allowing witness Childress to testify that Universal made a profit on the sale of finished lifting plugs?

12. In regard to Respondents' point 10, did the trial court err in admitting into evidence Petitioners' exhibits 96, 97, 98, and 99?

13. Is the award of damages in this case excessive?

14. Did the trial court err and deny Respondents their right to a jury trial by delivering an impermissible "Allen charge" to the jury?

STATUTES INVOLVED

Respondents admit that Petitioners correctly cite and reproduce the relevant provisions of Section 1 of the Sherman Act and Section 4 of the Clayton Act. The Petition contains an apparent typographical error as to the citation of the Robinson-Patman Act, however, and fails to reproduce all the relevant portions of that statute. The relevant portions are Sections 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f), which provide in pertinent part as follows:

"(a) It shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . *Provided* . . . That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

• • • •

"(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

STATEMENT OF THE CASE

Respondents agree that the facts of the case are accurately set forth in the opinion of the Court of Appeals. As

discussed below, Petitioners' challenge to those facts is *dehors* the record and is thus not before the Court.[3]

REASONS FOR DENYING THE WRIT

First and foremost among the many reasons for this Honorable Court's declining to exercise its discretionary power to issue a writ of certiorari is the clear fact that the United States Court of Appeals for the Fifth Circuit has already reviewed the 2,668 pages of the record on appeal,[4] thoroughly analyzed the complex maze of facts contained therein, and reached the correct, just and proper result under both settled case law and the facts.

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[3] Because of Petitioners' submission of the Rutherford Affidavit, which is not in the Record on Appeal from the trial court, Respondents conditionally offered counter-affidavits to the Court of Appeals and asked that the same be considered only in the event that the Rutherford Affidavit was accepted for any purpose. Such counter-affidavits are attached hereto as the Appendix.

The Court of Appeals rendered its opinion on August 21, 1975. Thereafter and in connection with their filing of a Motion for Rehearing, Petitioners tendered to the Court of Appeals the Affidavit of Pat Rutherford, which is reproduced at pages 15 to 16 of the Petition. The Rutherford Affidavit was dated September 9, 1975, and purported to refute the factual recitations of the lower court's opinion. On September 24, 1975, the Court of Appeals ordered Respondents to reply to the first of Petitioners' points in its Motion for Rehearing, which point was founded directly upon the Rutherford Affidavit.

In their Reply to the Motion for Rehearing, Petitioners recognized and cited the long line of uniform holdings of the Courts of Appeal that affidavits outside the record are not before a reviewing court. Because the Court of Appeals called for a reply to Petitioners' argument regarding the Rutherford Affidavit, however, Respondents conditionally tendered to the court the affidavits of James R. Cornelius, Jr., and Edward Janowski, the Government's Contracting Officer on the very contract in question. Petitioners' Motion for Rehearing was denied without opinion on November 12, 1975.

[4] The Bill of Costs in the Court of Appeals demonstrates that this record, excluding the briefs of counsel, consists of 1019 pages of the Record of Proceedings, 1133 pages of the Printed Appendix, and 516 pages of documentary exhibits.

The Sherman Act Question

The opinion of the Court of Appeals does not, as represented by Petitioners, hold that the jury was "justified in finding a violation of Section 1 of the Sherman Act".[5] To the contrary, the court below expressly stated that it was *assuming* for purposes of its opinion that a violation had been shown:

> "If plaintiffs [Petitioners'] theory of the case and version of the evidence were accepted by the jury as they *may* have been, then a Sherman Act violation has been established. *We assume arguendo* that the jury verdict was based on this premise that it was supported by the evidence."[6] (emphasis added)

The court below then ruled that even if a Sherman Act violation is established (step one), an antitrust plaintiff must also establish that the violation proximately caused injury to plaintiff's business (step two) and give some indication of the amount of those damages (step three). The court squarely held, in its opinion by Judge Clark, that it was Petitioners' failure to satisfy the second step — not the third — that led to the result reached.[7] Petitioners utterly misconceive the court's holding when they attempt to challenge the holding below by relying upon those cases supporting the settled principle that assumptions of a lesser evidentiary certainty are justified on the third step of the antitrust plaintiff's journey. Neither the Court of Appeals nor Respondents disagree that lighter proof can satisfy the third step, but the law has never been that the second step can be satisfied by less than the usual standards of proof or by the "assumptions" in which Petitioners would have the courts indulge.

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[5] Petition at 5.

[6] Opinion below, 517 F.2d at 1063, Petitioners' Appendix at 4.

[7] *Id.*, 517 F.2d at 1064, Petitioners' Appendix at 4-5.

The Court of Appeals correctly held that when the alleged violation is accomplished by the granting of a single, conspiratorially low and discriminatory price to one of the plaintiff's competitors, which price is below the usual and prevailing price of the marketplace, the "but for" test of causation is applied, and that this test requires a determination to be made of what the position of the parties would have been had the conspiratory price not been granted. The lower court's opinion amply compiles authorities refuting Petitioners' contention that the test should be to ascertain what the plaintiff's position would have been had it too received the special "discriminatory" price. Respondents will not here reiterate those authorities. Had the court below held that the fact of a discriminatory price must be ignored altogether, it would indeed have been a novel holding of first impression, as is alleged on page 18 of the Petition; but the court did *not* so hold. Nor did the court hold or even intimate that such evidence could not be used in computing the amount of damage once the fact of damage has been shown. To the contrary, the Court of Appeals rightly held that if a wrongful act has occurred when a supplier has given one of several potential customers a discriminatory price, a plaintiff may not claim that it too should have received the improper price.

Applying this correct view of the law, the Court of Appeals' panel of Judges Clark, Goldberg, and Gee reviewed the entire, voluminous record and properly concluded that Petitioners had failed to establish their purely factual contention that they *would have* received the Government contract in question "but for" the alleged conspiracy.[8]

Petitioners' factual argument rests on an assumption that Land-Air, Inc., could not have received the contract

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[8] *Id.* The relevant holding is also reproduced at page 8 of the Petition.

in question. The opinion below amply explains why this assertion is unsupported by the record,[9] and Petitioners' offer of evidence *dehors* the record (the Rutherford Affidavit) is insufficient to establish that Land-Air's position in the bidding should be ignored. First, evidence outside the record is not properly before the Court, but even if the Rutherford Affidavit is considered, it is totally discredited and refuted by Respondents' conditional submission of controverting affidavits.[10] The affidavits appended hereto were conditionally offered by Respondents for consideration by the Court of Appeals in the event the court accepted the Rutherford Affidavit, which was tendered by Petitioners as "new evidence," and are also conditionally offered to this Honorable Court for consideration only in the event that the Rutherford Affidavit is accepted for any purpose.

As the Cornelius Affidavit [Attachment 1] indicates, Respondents have, since the date of the opinion of the Court of Appeals, further investigated the actual facts and circumstances surrounding the award of the contract here in question. As a result, two affidavits have been obtained from Edward Janowski, who was the Contracting Officer on this award. Although the affidavits and attached exhibits are largely self-explanatory, a few points deserve emphasis.

First, the Rutherford Affidavit unequivocally states that Land-Air had effected a withdrawal of its bid. This assertion is demonstrably false. Exhibit B to the first Janowski Affidavit [Attachment 2] evidences the "condition of bidding" that required bid withdrawls to be in writing and to be received before the bids are opened, a requirement of which Land-Air was specifically advised, before it bid, by Exhibit A to the same affidavit. This requirement is also in the record before the Court. *See* Printed Appendix in the Court of Appeals at 429. If Land-Air unilaterally at-

[9] *Id.*

[10] *See* note 3, *supra*.

tempted to withdraw its bid *after* the bid opening, as the Rutherford Affidavit alleges, such an attempt would have been ineffective because the Government's consent would have been required. It is inconceivable that any businessman who has committed his company to a contract obligation to the Government of nearly a million dollars' worth of business would not have taken care to obtain written evidence of the Government's consent when withdrawing from the commitment. Yet, the Rutherford Affidavit contains no documentary support, and the second Janowski Affidavit [Attachment 3] shows that the Government has no indication whatsoever in its files that Land-Air even tried to withdraw its bid, much less that it was permitted to do so. Exhibit C thereto shows that the Government was still corresponding with Land-Air on January 7, 1972, and Exhibit D shows that Land-Air was still being evaluated on December 15, 1971. Thus, no withdrawal occurred, and there is no indication a withdrawal was even attempted.

Second, the Rutherford Affidavit states that the reason no pre-award survey was done on Land-Air was because Land-Air had withdrawn its bid. This is also incorrect. As Exhibits A and B to the second Janowski Affidavit [Attachment 3] demonstrate, the only reason no survey was done was the mistaken misrouting of documents regarding Land-Air. [Because the handwritten portions of Exhibits A and B are difficult to read, typed transcripts are provided herewith as Attachment 4.] When the mistake was discovered, the pre-award survey was not ordered *because* the bids had already been evaluated and "at this point" it "looks like [Land-Air is] not actually low-bidder anyhow" [Ex. B, dated December 17, 1971].

The Robinson-Patman Act Question

Expressly pretermitting consideration of all the other points raised by Respondents in regard to the Robinson-

Patman Act issues,[11] the Court of Appeals founded its opinion on the narrow ground that "Universal and H/R were not competing for the same consumer dollar in their activities . . ."[12] Judge Clark's opinion sets forth complete justification under the law and the record for reaching this factual conclusion, and Respondents will not here expand upon that discussion except to point out that Petitioners' attempted reliance upon the *Bruce's Juices* case[13] was expressly considered and properly rejected by the Court of Appeals.[14]

Rule 19(1)(b) Considerations

Rule 19(1)(b) lists various indicia of when the Court's discretionary power to issue a certiorari should be exercised; none of those reasons are present here. There is no conflict among the circuits. There is no important question of law which has not been decided before by this Court or which should be decided. There is no conflict with the prior decisions of this Court. Lastly, the Court of Appeals did not depart in the least from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court.

Another reason why it would be inappropriate to issue a writ in this case is that the facts are unique and unlikely ever to arise again. By way of example, the Court of Appeals recognized that the goods here in question could be sold only to a single end-user — the military.[15] Thus, the issues here presented could arise again only where a given company is currently purchasing from a certain supplier and is reselling to the military, the Government solicits

[11] Opinion below, 517 F.2d at 1066, Petitioners' Appendix at 6.

[12] *Id.*, 517 F.2d at 1068, Petitioners' Appendix at 9.

[13] American Can Co. v. Bruce's Juices, 187 F.2d 919 (5th Cir. 1951), cert. dismissed, 342 U.S. 875 (1951), modified at 190 F.2d 73 (5th Cir. 1951).

[14] *Id.*, 517 F.2d at 1067, n.17, Petitioners' Appendix at 17-18, n.17.

[15] *Id.*, 517 F.2d at 1061, n.1, Petitioners' Appendix at 2, n.1.

new bids, and both the company and its competitors obtain price quotations from the same supplier. Moreover, it should not be overlooked that Petitioners' case was founded solely upon an alleged price discrimination, and the Robinson-Patman Act itself is currently being studied by the Executive and the Legislative branches with the possible goal of repealing the Act entirely. Highly placed officials of the Antitrust Division of the Department of Justice are urging repeal of the statute,[16] and both the Congress[17] and the White House[18] have begun hearings to determine whether the Act should continue to exist.

The issues in the present case are unlikely to recur and are too narrow and factual in nature to warrant review by this Court on certiorari. The only real questions turn on the particular facts of this case and are of interest only to the parties to it. In essence, Petitioners ask this Court to repeat the Court of Appeals' review of the lengthy trial record to see if it can find evidence to support Petitioners' factual allegations. This Court has long held that this is not a purpose to be served by the extraordinary writ of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). In the instant case, Petitioner raises questions entirely dependent upon the resolution of

[16] *See, e.g.*, 723 A.T.R.R. A-4 (Testimony of Joe Sims, Special Assistant to the Head of the Antitrust Division, calling for abolishment of the Act, July 22, 1975); 723 A.T.R.R. A-20 Testimony of Joe Sims, suggesting that "complete repeal" of the Act would be "appealling," September 30, 1975); and 737 A.T.R.R. A-6 (Address by Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division, calling for "outright appeal," November 4, 1975).

[17] Congressional subcommittee hearings are reported at 738 A.T.R.R. A-3 (November 11, 1975), 739 A.T.R.R. A-19 (November 18, 1975), 740 A.T.R.R. A-3 (November 25, 1975), and 743 A.T.R.R. A-21 (December 16, 1975).

[18] Activities and hearings of the White House Domestic Council are reported at 740 A.T.R.R. A-3 (November 25, 1975), 742 A.T.R.R. A-20 (December 9, 1975), and 743 A.T.R.R. A-21 (December 16, 1975).

contested issues of unique fact. The Court of Appeals has already fulfilled the task of conducting that review and has correctly applied the unbroken line of authorities upon which it relied to reach its just result. Certiorari should be denied.

CONCLUSION

For the reasons set forth above, Respondents respectfully pray that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(Signed) B.J.Bradshaw
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CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondents, a member in good standing of the bar of this Court, hereby certifies pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari and three copies of the separately bound Appendix thereto have been served upon each party hereto by depositing same in a United States mail box, with first class postage prepaid, correctly addressed to their counsel of record at their post office addresses.

Dated: February 23, 1976.

Original
(Signed) B.J.Bradshaw
.....
BUREN JACKSON BRADSHAW